INDEX

	Page
The Purpose of This Brief	2
I. The Production and Gathering of Gas are Essentially Local in Character	4
II. In Regulating Independent Producers and Gatherers of Gas, the Commission Would be Faced With the Complicated Interrelationship Between the Oil Industry and the Gas Industry	6
Conclusion	9

Citations

Cases:

Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682 (1947)	3, 6
Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949)	5
In the Matter of Columbia Fuel Corporation, 2 FPC 200 (1940)	9

Other Citations:

Resources for Freedom, Vol. III, The Outlook for Energy Sources, United States Government Printing Office, 1952	7, 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 280

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

STATE OF WISCONSIN, ET AL.,
Respondents.

No. 281

STATE OF TEXAS, ET AL.,
Petitioners,

vs.

STATE OF WISCONSIN, ET AL.,
Respondents.

No. 418

FEDERAL POWER COMMISSION,
Petitioner,

vs.

STATE OF WISCONSIN, PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL.
Respondents.

BRIEF AMICI CURIAE OF THE STATES OF LOUISIANA, MISSISSIPPI, NORTH DAKOTA, WYOMING, AND THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS.

The States of Louisiana, Mississippi, North Dakota and Wyoming, by their respective Attorneys General, and the State Corporation Commission of the State of Kansas, the body charged with the responsibility of administering the oil and gas conservation laws of the State of Kansas, by its General Counsel, file this brief amici curiae pursuant

to Rule 27 of this Court, and urge the Court to reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit and affirm the order of the Federal Power Commission.

The Purpose of This Brief

It is not the purpose of these States in this *amici curiae* brief to restate and reargue the many questions of statutory construction and administrative law which are involved in this proceeding. Those questions will be adequately discussed in the briefs of the respective parties. Nor is it the purpose of these States to champion the cause of one or more of the many parties to this case. What these States hope to accomplish by this brief is to keep before this Court certain facts which it is believed will be helpful to a thorough understanding of the question presented.

The particular facts in this case relate only to the sales of Phillips. But the activities of Phillips involved in this proceeding do not differ substantially from those of hundreds of other independent producers and gatherers of gas who operate in these States. In addition, although the sales here involved are sales by a gatherer, there is nothing in the language of the Act to distinguish between sales by a producer and sales by a gatherer. Regulation of a gatherer's sales may well mean that producers are to be regulated also. For that reason, this case will probably be a precedent for the regulation or freedom from regulation by the Commission of independent producers and gatherers of gas. From its inception, it has been regarded as a test case. If this Court's decision should be in favor of regulation, the effect would be far reaching and the consequences would be felt far removed from the particular facts of this case.

Each of these States has enacted legislation providing for the conservation of oil and gas and has established administrative agencies authorized to carry out and en-

force these laws, with the ultimate purpose being to bring about the greatest conservation of oil and gas for the benefit of the public as a whole. In each of these States, gas is one of the important natural resources and is an appreciable source of revenue to the State and its citizens.

These States are therefore vitally concerned that there be no outside influence which would tend to reduce the effectiveness of the conservation regulations of these States. The seriousness of the impact upon State regulation of production and gathering of the extension of federal authority to independent producers and gatherers is emphasized by the fact that the Federal Power Commission, *the very agency to which Congress entrusted the administration of the Act*, found that its regulation of independent producers and gatherers "would, by its very nature, be inconsistent or constitute a substantial interference with" State conservation regulations (90 PUR (NS) at 352). No amount of argument that regulation of independent producers and gatherers by the Commission will be of benefit to consumers will overcome the fact that the States' conservation powers will be harmed, and thus indirectly but none the less certainly harm the consumer. Thus it is essential that that conflict and interference not be treated as immaterial, as it was by the Court of Appeals (205 F. 2d at 711, note 11), but that it be thoroughly examined and considered in the light of the relationship between the producing states and the independent producer and gatherer.

Upon such examination, we believe this Court will reaffirm the jurisdictional test which it pronounced in *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 690 (1947) and will hold that the Commission was correct in its decision in this case.[1]

---

[1] In full recognition that the first ground of the Commission's decision was that Congress did not intend to regulate sales made by independent producers and gatherers, we elect to discuss only the second ground of the

I. The Production and Gathering of Gas Are Essentially Local in Character.

The function which the producer and gatherer performs is totally unlike the transmission and distribution phase of the industry. His economic position in particular is the exact opposite of the transporter, since instead of operating with a long-term source of supply and an assured market, he must compete with hundreds of other producers and gatherers and develop his supply in a risk-taking and financially hazardous industry. Nor can the independent producer and gatherer rest upon his laurels in the event he is fortunate enough to find production. To stay in business in this fast moving and exhaustible resource industry, he must be constantly looking for new sources of supply. All too often, what may appear to be a gusher at first is no more than a marginal well a few months or a few weeks later.

The producer and gatherer's activities are varied. There is much to be done besides simply turning a valve and waiting for payment for the gas. If the gas is casinghead gas, equipment must be installed and maintained to separate the oil from the gas. In any event, gathering systems must be laid and maintained. Gasoline plants must be built to process the gas to remove natural gasoline and liquefied petroleum gases. Residue lines must be provided to return gas to the leases for lease operation. The purchaser may require that the gas be dehydrated and, if the gas is sour (containing hydrogen sulphide), may require that it be treated. All this is in addition to the primary, always risky, job of finding production.

But these activities take place within a fairly limited area—within or close by the field of production. In all these

---

Commission's decision, namely, conflict with States' powers. We do this, not because it is believed to be more tenable than the first, but because it particularly affects state interests, and the states are particularly qualified to discuss it.

activities the producer and gatherer of gas performs a function not unlike that of the ordinary manufacturer. He begins with a raw material which he has taken from the ground. He assembles it in a central location, where he divides it into two basic products, liquids, which may be the basis for the manufacture of many additional products, and residue gas. The residue gas is then sold—to a purchaser who comes to the plant and gets it. The purchaser may transport and sell the gas in interstate commerce, and thus make the sale by the producer and gatherer one in interstate commerce, but that legal technicality does not change the economic function. The sale is merely the culmination of all these activities, activities which are begun and completed within a local area.

Congress was fully aware of the fact that production and gathering are essentially local in character. This was clearly pointed out by the Solicitor of the Federal Power Commission during the hearings preceding the passage of the Act, when he described production and gathering as a function "purely local in character."[2] This Court has also recognized this fact and referred to production and gathering as one of the "excepted local matters." *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 508 (1949).

All of these local activities are subject to local regulation. These States have enacted and enforce comprehensive conservation programs covering the entire activities of the producer and gatherer. The Commission found that its regulation would conflict and interfere with this local regulation (90 PUR (NS) at 352). The brief of the States of Texas, Oklahoma and New Mexico show in detail how that conflict and interference will come about.

---

[2] *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 505, note 7.

The point which we wish to emphasize here is that the effect of the Commission's regulation will bear much more heavily upon the independent producers and gatherers than upon the transmission companies. This is so because the producer and gatherer's economic life depends entirely and completely upon the price which he receives for his gas. The impact of regulation upon his sole income is direct. In contrast, the great bulk of the transmission companies' earnings, even as to those companies which produce some of their own gas, are derived from the revenues which they receive for their service of transporting the gas for long distances. The independent producer and gatherer has no such cushion to absorb the effects of regulation. He has only a product, not a service, to sell. His function is completed, and his total income received, when he sells his gas in the field. Since he has no other source of income, any reduction in the price which he receives for his product will make it that much more difficult for him to carry out and conform to the conservation programs of the states.

This Court recognized in the *Interstate* case that such might be the effect upon field sales even by transmission companies, and that in such event the Commission's jurisdiction should not attach. We submit that freedom from regulation by the Commission is all the more necessary in the case of the independent producer and gatherer.

II. In Regulating Independent Producers and Gatherers of Gas, the Commission Would Be Faced With the Complicated Interrelationship Between the Oil Industry and the Gas Industry.

No one has yet suggested that the Commission has the power to regulate the interstate sale of oil. Presumably, the Commission, if it were required to regulate independent producers and gatherers of gas, would make every effort to confine its regulation to the regulation of gas. But the complicated interrelationship between the oil industry and

the gas industry means that the Commission would face a difficult, if not insurmountable, problem. Despite continual effort on the part of the Commission, there is little likelihood that the Commission's regulation of independent producers and gatherers of gas would not have an adverse effect upon the oil industry.

In 1950, about one third of the gross production of natural gas came from oil wells.[3] But that proportion may be expected to increase substantially as drilling goes deeper and more and more so-called gas condensate fields[4] are discovered. The facts in this case show that six of the ten gasoline plants from which Phillips' sales are made are processing all or part casinghead gas, gas that is produced in association with oil. (90 PUR (NS) at 330-336). But even where the gas comes from a well producing gas only, it is not disassociated from the oil industry, since it may well have been discovered during a search for oil and the gas itself contains many valuable products which may be recovered in liquid form through processing.

Oil and gas are usually associated in the reservoir. Wherever oil is found, some gas, in greater or lesser quantities, is found with it. For many years, the principal use of this gas was in the lifting of oil, and it is still essential for that purpose in both primary and secondary recovery operations. But in recent years the conservation programs of the producing states have required greater utilization and marketing of this casinghead gas, which had previously been

---

[3] *The Outlook for Energy Sources,* Vol. III, Resources For Freedom, pp. 16-17, U.S. Government Printing Office, 1952.

[4] Gas condensate and gas distillate fields are those in which the wells have many of the characteristics of a gas well, but condensing at the wellhead are large volumes of a light colored, high-gravity liquid which must be handled and further refined like oil. For this reason, this type of well is something of a hybrid between an oil well and a well producing gas only. Because such fields are found only at great depths, the gas is always produced under high pressures, with shut-in pressures in excess of 2000 pounds not uncommon.

flared after it had served its purpose of lifting the oil. This means that every producer of oil is also a producer of gas; if he is in the oil business, he is or soon will be in the gas business. Moreover, most gas fields are discovered in the process of looking for oil. If the Commission should regulate a producer and gatherer of gas, it in all likelihood would be regulating a person who, as a part of the same operations, is also a producer and gatherer of oil.

To the oil producer, the gas which he produces with his oil is valuable for two purposes: without it he very likely could not produce oil at all, or at least only at much greater expense; the price which he receives for his gas is in effect an additional return for his oil. It has been said that an attractive price for gas is an added incentive for the exploration for oil, since the money received for the gas is in effect a per-barrel increase in the price of oil.[5]

To the Commission, the result is the same as if it were trying to regulate the meat packer's price of pork chops, but with the rest of the products dependent upon a competitive market. The specific cost of producing a thousand feet of gas can no more be physically separated from the cost of producing a barrel of oil than the cost of the pork chops can be physically separated from the cost of the rest of the meat. It is all produced together, as a result of a single operation. The only possible method of separation is through some accounting allocation, upon the validity of which opinions will differ and which can only be arbitrary, if not capricious. No one, so far as we know, has yet devised a functional method for allocating between gas and oil the cost of a dry hole which did not produce either.

The purpose of any such allocation would be to charge a greater or less cost to oil than to gas, depending upon what-

---

[5] *The Outlook For Energy Sources*, Vol. III, Resources For Freedom, p. 21, U.S. Government Printing Office, 1952.

ever method of allocation the Commission might choose. In this connection, it seems almost unquestionable that the natural inclination of the Commission, whether intentional or not, would be to charge a greater portion to the oil, for the benefit of gas consumers. The result would be a reduction in the price of gas and an increase in the cost of oil. Since the conservation of oil is subject to the same relationship to price as the conservation of gas, the producing States' problems of the conservation of oil would be further complicated and interfered with, at least to the extent that any such allocation charged more of the total cost to oil than what some omnipotent authority might say is the actual cost of producing oil. In actuality, as time progressed, it would be almost a certainty that oil would have to stand the bulk of the cost of exploring for gas, if not the cost of production.

The Commission recognized this problem when it first considered this question of its jurisdiction. It said then that its conclusion that it has no jurisdiction to regulate independent producers and gatherers of gas was "reinforced" by this complicated interrelationship between oil and gas. *In the Matter of Columbian Fuel Corporation*, 2 FPC 200, 207 (1940). The same considerations apply today. Not only would the problem of regulation be greatly magnified, but the resulting conflict with State conservation powers would be multiplied and intensified.

Conclusion

Regulation by the Commission of independent producers and gatherers of gas would be the regulation of what is essentially a local activity, although the sales may in legal concept be interstate commerce. Because it is a local activity subject to comprehensive local regulation in the interest of conservation, the additional imposition of federal regulation upon the culmination of this activity would seri-

ously interfere and conflict with that local regulation. The conflict and interference with local regulation would be further intensified by the close interrelationship between the oil industry and the gas industry, since it would be impossible for the Commission to regulate independent producers and gatherers of gas without in some degree adversely affecting the production of oil, thus adding to the States' problems of oil conservation. For these reasons, we urge the Court to reverse the decision of the United States Court of Appeals for the District of Columbia Circuit and affirm the order of the Commission.

Respectfully submitted,

FRED S. LEBLANC,
Attorney General of Louisiana,
State Capitol Building,
Baton Rouge, Louisiana.

J. P. COLEMAN,
Attorney General of Mississippi,
State Capitol Building,
Jackson, Mississippi.

E. T. CHRISTIANSON,
Attorney General of North Dakota,
State Capitol Building,
Bismarck, North Dakota.

HOWARD B. BLACK,
Attorney General of Wyoming,
State Capitol Building,
Cheyenne, Wyoming.

JAY KYLE,
General Counsel,
State Corporation
Commission of the
State of Kansas,
New England Building,
Topeka, Kansas.

J. PAUL MARSHALL,
Union Trust Building,
Washington 5, D. C.
Of Counsel.